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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1791

UNITED STATES OF AMERICA,

Appellant,

—v.—

AMERICAN FRIENDS SERVICE COMMITTEE, *et al.*,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellees herein, the American Friends Service Committee, Lorraine Cleveland and Leonard Cadwallader, pursuant to Rule 16 of the Rules of this Court, move that this appeal be dismissed, or that the final judgment and decree of the court below be affirmed, on the grounds that the question is so plainly insubstantial, and the decision below so plainly correct, as not to warrant further review by this Court.

Statement of the Case

The Solicitor General brings to this Court for review on direct appeal a decision in which the court below, giving effect to the clear dictates of the First Amendment and of innumerable decisions of this Court, required that the gov-

ernment take certain minimal steps to accommodate its methods of tax collection to the religious and conscientious beliefs of two of its citizens.

The Appellees, American Friends Service Committee (hereinafter "AFSC" or "Service Committee"), and two of its employees, Lorraine Cleveland and Leonard Cadwallader,[1] instituted this action in order to compel the cessation of further use by the government of the withholding method of collecting from the individual plaintiffs so much of their federal income taxes as is applied to military purposes. Contrary to the implications in the government's Jurisdictional Statement (p. 17, fn. 9), no claim was made that the imposition of the taxes is itself a violation of First Amendment rights, but only that the use of the withholding method, where numerous other means of collection are available, gives rise to such a violation in the context of the unique facts of this case. The plaintiffs sought both an injunction against the further use of withholding, and on behalf of AFSC, a refund of $574.09, representing that portion of the employees' federal income taxes which was not withheld from the employees' salaries but was paid to the government from the Service Committee's own funds in the quarterly period in question, October 1, 1969, through December 31, 1969.

The AFSC is a religious corporation of the State of Delaware, which throughout more than one half century of its existence has, on behalf of the Religious Society of Friends (Quakers), carried out religious, charitable, social, philanthropic and relief work on an international scale,

[1] Cadwallader has since resigned from the Service Committee for reasons unrelated to this action.

with especial concern for the expression and implementation of the Quaker peace testimony as an integral part of Quaker religious belief and religious testimony. (Appendix A to Jurisdictional Statement, at 1a-2a; hereinafter denoted by page numbers followed by the letter "a".) The employee plaintiffs, Cleveland and Cadwallader, citizens and residents of the United States and of the Commonwealth of Pennsylvania, are conscientiously opposed to participation in or support of war in any form, and this religiously based conscientious objection specifically includes objection to such support as is rendered by the payment of the portion of their federal income taxes which is applied to military or defense purposes (2a-3a). For this reason, Cleveland and Cadwallader in 1969 requested that AFSC cease withholding from their salaries the portion of their federal income taxes then attributable to the preparation for and waging of warfare. AFSC felt itself morally compelled, as a religious corporation dedicated to serving world peace, to honor this religiously and conscientiously motivated request of its employees, and therefore ceased to withhold such taxes in the final quarter of the calendar year 1969. The amount not withheld was 51.6% of the taxes otherwise due, a proportion determined by the Friends Committee on National Legislation to be the proportion of the federal budget devoted to military purposes (5a).[2]

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[2] The figure of 51.6% of the federal budget as the proportion expended for military purposes was found by the court below to be "a reasonable, rational and fair percentage amount which can be used to determine the proportion of the individual plaintiffs' taxes, which are spent for purposes to which they conscientiously object" (9a). The finding was based on extensive testimony of expert witnesses introduced by plaintiffs, and the government made no effort to contradict this testimony.

Although AFSC thus discontinued withholding these amounts from its employees' salaries, it nevertheless continued to pay to the Internal Revenue Service, out of its own corporate funds, amounts equivalent to the amounts of taxes not withheld. AFSC felt itself to have little choice as to the making of such payments since, should it fail to do so, both AFSC and its responsible officers would face a risk of criminal prosecution for failure to comply with the requirements of 26 U.S.C. §3402, the statutory provision imposing the obligation of withholding. Each payment to the Internal Revenue Service by AFSC was followed by a claim for refund of such monies, as erroneously and illegally assessed, in violation of the First Amendment to the United States Constitution, but each such claim was denied (5a-6a).

At trial, AFSC presented extensive and unrebutted evidence, and the District Court found, that AFSC has historically been dedicated to the purposes stated above; it was also demonstrated that AFSC was threatened with irreparable economic injury because of the threat of resignation by employees whose expression of their religious objection to the support of war was being abridged by the operation of the withholding tax laws, and because of continued questioning by contributors of the propriety of their donations to an organization acting as a collector of war taxes. Evidence was also presented that AFSC was being seriously injured by its forced participation in the frustration of its employees' ability to stand witness to their deeply held religious opposition to war. The Service Committee, an organization founded on Quaker concern for individual conscience, has throughout its history

sought to implement these beliefs through its untiring labors in behalf of world peace and reconciliation, fundamental elements of Quaker belief, but was placed by the withholding statutes in such a position that it must aid the government in contravening the very individual conscience which it exists to support (4a-5a).

The individual plaintiffs, Cleveland and Cadwallader, likewise demonstrated incontestably, and the District Court found, that the withholding scheme constituted a serious abridgement of the free exercise of their religion. Both are deeply and fundamentally opposed to war, as demonstrated by the very fact of their employment with the Service Committee. Indeed, in the case of Cadwallader, the Selective Service System had recognized the sincerity and depth of his belief by granting him conscientious objector status. For both Cleveland and Cadwallader, a central and inseparable part of their faith is that they must give active expression to their religious objections to war, in order to bear witness to their beliefs. To force payment of their war taxes without tolerating even a symbolic gesture of refusal and enforced collection by the government, is to suppress the most central and deeply held tenets of their religious beliefs. When the government, by its insistence on the withholding method of collecting taxes, denies them the opportunity to give expression to these beliefs, it abridges directly the free exercise of their most cherished religious and conscientious beliefs. It is from this abridgement that the plaintiffs sought relief in this action (2a-4a).

Finally, the plaintiffs presented extensive proof, unrebutted by the government, that there is available to the

government a wide range of means for collecting the taxes here involved, with little or no additional effort or inconvenience as compared to the withholding method.[3] They further demonstrated that the government had in fact collected every penny in taxes which was due it, and that the government's hand-wringing speculations on the collapse of the income tax system, should the plaintiffs be granted the relief they sought, were totally without basis in fact (7a-8a).

Based upon these nearly, even totally, unique facts, of employer and employees who share in similar deeply held religious objections to the government's actions, and the nearly microscopic interests of the government in continuing the use of withholding, the court below held that the government simply had not shown a sufficient interest in the use of the withholding method to override the basic rights guaranteed to the plaintiffs by the United States Constitution (19a).

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[3] This evidence was introduced chiefly through the testimony of Bernard V. Lentz, Esq., a distinguished member of the Philadelphia bar, and a leading expert on federal taxation, including particularly the collection procedures employed by the Internal Revenue Service. Mr. Lentz's testimony was unshaken by extensive and vigorous cross-examination, and the government offered no contradictory proof of its own. (Record of Trial, at 208-250.)

ARGUMENT

POINT I

The questions presented are not so substantial as to require review by this Court.

Throughout the Jurisdictional Statement, the Solicitor General repeatedly asserts that the questions presented by this case are of overwhelming importance, and that plenary consideration by this Court is necessary in order to review a decision which will otherwise shake the Republic to its very foundations. It is respectfully submitted that the decision by the court below has no such cataclysmic implications. The issues presented below, and the interests which the appellees sought to protect in the court below, are indeed of the greatest importance to them, involving the right to exercise their most deeply cherished religious beliefs. However, the decision below, which does no more than recognize the requirements of innumerable decisions of this Court, and apply those requirements in a unique and limited context, will not have the far reaching effects predicted for it by the government.

Thus, the Solicitor General fears that the decision below "will *doubtless* have a significant impact upon the revenue," and that it will "*undoubtedly* engender a substantial volume of litigation" (p. 8; emphasis added), since it permits the exercise of religious beliefs by a taxpayer who objects as a matter of conscience to "particular" government expenditures. The District Court made no such ruling and the decision below will not open up the floodgates. First, it is significant that, although seven months have elapsed

since the decision below, this Court has not been advised of a single case—much less "a substantial volume of litigation"—which has been instituted based on the same unique principle. Second, the Solicitor General overlooks the carefully circumscribed scope of the decision below. It is expressly limited to the unique facts of a case which presents the unusual juxtaposition of (a) a religious corporation as employer; (b) employees who are conscientious objectors of the same religious group; (c) the central role of "peace testimony" common to employer and employee; (d) the religious employer's long history of cooperation and candor with the government, consistent with its historical tradition, which goes back to the earliest days of the Republic, of seeking accommodation and compromise with government in those rare instances where there is a confrontation between individual religious conscience, and a national decision to make war.

Moreover, despite the speculations of disaster by the Solicitor General, unfortunately abetted by equally baseless forebodings in such cases as *Autenrieth* v. *Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. den.*, 397 U.S. 1036 (1970); and *Muste* v. *Commissioner*, 35 T.C. 913 (1961),[4] the most relevant statistics suggest that no vast numbers

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[4] The government has consistently, in the court below and in this Court, failed or refused to recognize the true nature of this case. Repeatedly, by its citations to such cases as *Autenrieth* and *Muste*, and otherwise, the government has sought to imply that this is a case where the plaintiffs challenge the constitutionality of the tax itself, or of the uses to which it is put, and that they seek to be relieved of any obligation of payment at all (Jurisdictional Statement, at p. 12, p. 17, fn. 9). But the plaintiffs have made clear at every turn that they do not here make any such challenge; the only claim, as the court below recognized, is that the taxes must be collected by some other means.

of taxpayers will in fact object to the withholding method on conscientious grounds.[5]

In addition to the small number of persons who might take advantage of the possible benefits of the decision below, the appellees presented substantial evidence, and the court below found, as a matter of fact, that little, if any, additional inconvenience to the government would result if the Internal Revenue Service were required to adopt an alternative means of tax collection for the few people here involved. It was also found as a matter of fact that all of the taxes involved, together with interest, and penalties,[6] had in fact been fully collected by the government.

Thus, at most, the impact of the decision below, insofar as it will affect the government, is to cause a minor bureaucratic inconvenience, and the decision does not rise to the

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[5] In a parallel situation, the various Selective Service acts have always provided an exemption for conscientious objectors. 50 U.S.C. App. §456(j). Even in June, 1971, at the height of the Vietnam war, only 1.11% of draft-eligible men had been placed in Class I-O (by reason of religious training and belief, conscientiously opposed to participation in war in any form). Figures compiled by National Interreligious Service Board for Conscientious Objectors, from statistics contained in Selective Service System, REGISTRATION AND CLASSIFICATION OF SELECTIVE SERVICE REGISTRANTS (Monthly Report of Statistical Section, Management Information Statistics Office).

[6] The court below found that the 6% annual interest rate, and ½ of 1% per month penalty, assessed against the individual plaintiffs "are calculated at a rate to . . . reimburse the government for any collection costs which it might incur in resorting to the levy process" (7a-8a). The court also found, however, that at least in cases where only small amounts of money were due, the interest and penalties would not cover the additional costs of collection (8a). Nevertheless, the District Court correctly went on to hold that the minuscule additional costs to the government could not outweigh the plaintiffs' fundamental constitutional rights to the free exercise of their religion. See Point IIA, *infra*.

level of importance required for review by this Court. *Cf.* Stern & Gressman, SUPREME COURT PRACTICE, §4.29 (4th Ed. 1969).[7]

POINT II

The decision below is correct and should be affirmed.

A. *The Court Below Correctly Held the Withholding Statute to Be Unconstitutional as Applied to These Plaintiffs.*

There can be little doubt that the decision below is correct on its merits. The appellees demonstrated in the court below that the withholding system of tax collection, as applied to them, constitutes a direct and serious abridgement of their deeply cherished religious beliefs, and the government would be faced with little if any difficulty in resorting to other means to accomplish its goal of collecting the taxes in question. See note 3, *supra*. The government had full opportunity in the court below to present evidence as to any possible difficulties which it might face if it were prevented from collecting taxes from Cleveland and Cadwallader by the withholding method; it did not choose to present even a shred of such evidence.

Its arguments in this Court, like its arguments in the court below, demonstrate an utter misperception of the analysis to be applied in a case involving the free exercise of religion.

Thus, the government asserts that the finding of the court below, that the use of the withholding method does abridge the appellees' free exercise of their religious be-

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[7] By suggesting that appellees are urging a principle which would allow resistance to any "particular" government expenditure, the Solicitor General reveals a total misunderstanding both of the issues

liefs, "cannot be squared with this Court's decisions construing the Free Exercise Clause of the First Amendment." (Jurisdictional Statement, at p. 9.) Such a finding of fact, however, is plainly in no way in conflict with any decision of this Court.[8] The plaintiffs demonstrated by overwhelm-

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in this case and the critical essence of conscientious objection as traditionally recognized in American law. Appellees are not espousing a system of moral anarchy where they are free to obey or disobey any law by merely uttering the word "conscience". The conscientious objection principle which our legal system has recognized since the earliest days of the Republic is limited to participation in war—the recruitment, organization, training and operation of the armed forces, where citizens are compelled to obey military orders to kill other human beings in accordance with national policy. Appellees' concern is not with "particular" governmental expenditures, but with all governmental expenditures which involve individual taxpayers in participation in war—the killing of other human beings—in any form. And, to reiterate, they do not even seek any conscientious objector exemption from this tax payment. They seek only an opportunity morally to confront the Government as tax collector as it takes their assets.

[8] The government also appears to take issue with the substance of the plaintiffs' religious beliefs, objecting to their "erroneous belief" as to the nature of withholding (Jurisdictional Statement at p. 12, fn. 5), and asserting that the collection method in question "cannot rationally have a coercive effect on religious practices . . . ." (*Id.* at 10). Any such inquiry into the correctness of the content of religious beliefs is, of course, absolutely prohibited. *United States* v. *Ballard*, 322 U.S. 78, 86-87 (1944): "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . . When the triers of fact undertake that task, they enter a forbidden domain." See also *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1156 (D.C. Cir. 1969); *cf. United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). Nor is the government's position supported by its citation to *Follett* v. *McCormick*, 321 U.S. 573, 577-578 (1944) and *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943). As those cases observed, a generally imposed burden or duty, with only indirect effect on the religious interests asserted, may not be a forbidden abridgement; but governmental action which operates directly against the religious interest, such as the licensing schemes in those cases, and the tax collection scheme here, can indeed transgress the limitations of the First Amendment.

ing evidence that they hold conscientious beliefs, based on deep religious convictions, which compel them to oppose participation in or support of war or military activity in any form. This religious opposition to the support of military activity extends to the payment of that portion of their taxes which is used for such purposes. As an integral and inseparable part of these conscientious convictions, both Cleveland and Cadwallader believe it to be their religiously compelled duty to give active expression to their beliefs, and, thus, to bear witness to their opposition to the support of war, by refusing the voluntary payment of any taxes which are used for war.[9] Likewise, the Service Committee presented extensive and unrebutted evidence of the nature of its work, and its very purposes for existence. In addition to the expert testimony, referred to by the court below, of Dr. Edwin Bronner, an historian specializing in the history of Quakerism (3a-4a), there was also presented the testimony of Dr. Henry J. Cadbury, one of the founders of the AFSC, who testified to its establishment during World War I as a means by which Quaker young men, objecting to military service, could instead be employed to render aid and assistance to those in need—an example of the very type of accommodation which is all that plaintiffs seek in this case.

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[9] The centrality to Quaker belief of bearing witness to one's conscience has often been expressed. One clear statement of this duty, in the context of opposition to war, is to be found in FAITH AND PRACTICE, THE BOOK OF DISCIPLINE OF THE NEW YORK YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS at 42 (1968): "Friends will ever be concerned to relate their religious insights to the realities of international life. Opportunities for courageous action and for the expression of invincible good will remain under any political system. Whatever the system and whatever the situation that calls for decision, Friends are called upon to make their witness."

The United States, however, has imposed on the AFSC as employer of the individual plaintiffs, a statutory requirement of withholding from their salaries substantially all taxes before they are received by the individual plaintiffs. Because the United States has chosen this method for the collection of taxes rather than any of numerous other methods available to it, the individual plaintiffs have been denied any opportunity to give to their religious beliefs the expression which their consciences command. For this reason, the individual plaintiffs suffered a serious abridgement of their right to the free exercise of their religion, as guaranteed to them by the First Amendment, and the relief which they obtained in the court below is only a requirement that a less onerous means be used to collect the taxes in question.

The government, however, appears to argue that since the withholding statute is neutral on its face, and is imposed in order to attain the permissible goal of the collection of taxes, it cannot as a matter of law be found to abridge the free exercise of the plaintiffs' religious beliefs. The seemingly apparent distinction, which appears nevertheless so difficult for the government to understand, is simply the distinction between the end which the government seeks and the means which it uses to accomplish that end. This distinction, in matters bearing on the free exercise of religion, has been recognized by this Court for well over three decades. In *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), this Court held unanimously that while a state might properly seek to safeguard its citizens against the perpetration of frauds under the cloak of religion, "... the question remains whether the method adopted by Connecticut to that end transgresses the liberty safeguarded by the Constitution." 310 U.S. at 304-305.

Innumerable cases since *Cantwell* have made precisely the same distinction. Most recently in *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972), it was held that "a regulation neutral on its face may, in its application, nonetheless offend the Constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Similarly, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), it was held that while the state of South Carolina obviously might properly impose certain regulations to avoid the depletion of state unemployment compensation funds by false claims, the regulations could not stand when they were applied to penalize a Seventh Day Adventist's religiously compelled refusal to work on a Saturday. The state was compelled to find other means than the denial of benefits to persons in Mrs. Sherbert's position. Likewise, in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 62 (1943), school authorities sought to instill patriotism in their pupils, certainly a permissible activity, especially in a time of declared war, but the means chosen to do this, by compelling all students to recite the Pledge of Allegiance, was held improper, where it conflicted with the religious objections to such exercises which some students held.

The standard which the Solicitor General would have this Court apply to determine whether the court below was correct is nowhere articulated in the Jurisdictional Statement. The proper standard, however, is clearly set forth in a series of opinions of this Court, and it in no way supports the government's position. These opinions were cautiously followed, with scrupulous fidelity, by the court below. Thus, neither plaintiffs, nor the court below, are in disagreement with the observation from *Gillette* v.

United States, 401 U.S. 437, 461 (1971), that "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." This Court's decisions do, however, plainly support the proposition that in some circumstances, the duties fixed by government must in some measure yield to the religious and conscientious beliefs of its citizens.

Where, as here, it is conceded that the government has a valid secular interest in the prohibition or regulation which it seeks to impose, a First Amendment Free Exercise claim must be tested by a threefold inquiry: first, whether the claimed protected activity is, indeed, religiously motivated; second, whether that activity is restricted or abridged by the challenged provision; and, third, if both the other requirements are met, whether there is a sufficiently strong governmental interest in the use of the challenged provision that the otherwise protected activity may be restricted or abridged. *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940).

The plaintiffs clearly established in the court below that their conduct is religiously motivated and that the withholding scheme in fact restricts that conduct. Once such a showing is made, a burden is cast upon the government to come forward with some showing of a sufficiently great interest in maintaining that provision to justify the infringement of the plaintiffs' otherwise protected First Amendment rights. *Sherbert* v. *Verner, supra,* 374 U.S. at 406-407. The government has utterly failed to carry this

burden. While the strength of the showing required has been expressed in different ways over the past quarter century, the burden has consistently been a heavy one. In *Sherbert,* it was held " . . . that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " 374 U.S. at 406. In *Barnette,* Mr. Justice Jackson held for the Court that " . . . freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds [as the 'rational basis' test for due process under the Fourteenth Amendment]. They are susceptible of restriction only to prevent grave and immediate dangers to interests which the state may lawfully protect." 319 U.S. at 640. In *Yoder,* the State of Wisconsin sought to assert its interest in its "paramount responsibility," providing public education, an activity which "ranks at the very apex of the function of a State." 406 U.S. at 214. Even this paramount interest, however, and even its possible effect on hundreds or thousands of children, could not outweigh the religious interests asserted by the Amish in that case.

In the face of this heavy burden, the government has made no showing whatever of danger to any lawful governmental interest. It offered no proof in the court below of any serious additional burden if it must collect taxes by means other than withholding. It presents to this Court speculation from *Autenrieth* v. *Cullen,* 418 F.2d 586, 588-589 (9th Cir. 1969), *cert. den.* 397 U.S. 1036 (1970), that "if every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government

to function could be impaired or even destroyed." But *Autenrieth* involved taxpayers who claimed that they should be entirely exempted from taxation,[10] and is of little applicability where the relevant showing would be the effect of depriving the government, in strictly limited circumstances, of only one of its many means of collection of its tax revenues.

Further, if the government indeed contends that, if the decision below is allowed to stand, such multitudes of others will flock to claim its benefits that the government's functioning will be seriously threatened, an examination of the claim asserted by the plaintiffs should restore the proper perspective. This case presents the tiny minority of employees who hold deep religious objections to the payment of taxes in support of war, coupled with an equally deep religious belief that they must bear active witness to such objections. Their situation must be nearly unique when it presents also an employer which has the strongest sympathy for their position, and which indeed asserts that its own corporate religious beliefs are abridged when it is compelled to aid in restricting the free exercise of its employees' religion.

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[10] A claim not made in this case, despite the government's repeated efforts to make it so. See, fn. 4, *supra*. The Solicitor General's Jurisdictional Statement persists in its misperception of the narrow free exercise claim involved in this case. Plaintiffs do not interpose a religious objection to allowing the government to collect the taxes in question. They do interpose a religious objection to depriving them of an opportunity to confront the government directly as tax collector. See, Cleveland, "My Victory Against 'War Taxes,'" *New York Times*, Feb. 15, 1974, at 33. It is critical to the religious tenets of their peace testimony that they state to the government, as it were, "Here are my assets. I will not resist your seizure but I do not voluntarily pay war taxes. You, my government, through your tax collector, must undergo the moral confrontation of taking these assets from me by operation of law, knowing of my conscientious objection."

Rather than base a decision in this sensitive area on the vague speculations of the government as to the disasters which may result if it is required to respect the constitutional rights of its citizens, the appropriate course is that illustrated by the sensitive decision of the Supreme Court of Minnesota, *In re Jenison,* 267 Minn. 136, 125 N.W.2d 588 (1963).[11] Mrs. Jenison was a Jehovah's Witness who took literally the Biblical command, "Judge not, that ye be not judged." Matthew 7:1. Her resultant refusal to perform jury duty, considered by the Minnesota court in the light of *Sherbert,* must be respected, and her religious objections sustained, the court held, because:

> "There has been an inadequate showing that the state's interest in obtaining competent jurors requires us to override the latter's right to the free exercise of her religion. Consequently, we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt." 125 N.W.2d at 589. See also, *e.g., United States* v. *Hillyard,* 52 F. Supp. 612 (E.D. Wash. 1943); *State* v. *Everly,* 146 S.E.2d 705 (W. Va. 1966).

Indeed, even if the government had shown a likelihood of serious harm if it should lose the power to compel the withholding of taxes as to these plaintiffs, the government

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[11] Mrs. Jenison's conviction for contempt of court had been affirmed by the Minnesota Supreme Court on its first review of her case. *In re Jenison,* 265 Minn. 96, 120 N.W.2d 515 (1963). This Court vacated the decision and remanded the case for reconsideration in light of *Sherbert.* 375 U.S. 14 (1963).

still would not have met the burden required by *Sherbert*. Having held that Mrs. Sherbert's religiously compelled refusal to work on Saturday was indeed a protected "exercise of religion" within the meaning of the First Amendment, and that the state had failed to demonstrate the grave dangers which it must to overcome the Amendment's protection, this Court went still further, and held that "... even if the possibility of spurious claims did threaten to dilute the [State Unemployment] Fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." 374 U.S. at 407 (footnote omitted).

Like the state in *Sherbert*, the government here has failed to make any showing that it lacks alternative remedies. Indeed, the evidence showed, and the court below found as a matter of fact, that the government did have such alternative remedies in its power to levy on the taxpayers' property, and that it was using those remedies, without apparent difficulty, to the fullest extent necessary.

Thus, it is plain that this case is totally unlike those cases in which this Court has held that religious activities may properly be regulated without running afoul of the First Amendment. "The challenged . . . religious practice here does not pose a substantial threat to public safety, peace or order; if it did, analysis under the Free Exercise Clause would be substantially different. See *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Cleveland* v. *United States*, 329 U.S. 14 (1946); *Application of President and Directors of Georgetown College, Inc.*, 118 U.S. App. D.C. 80, 331 F.2d

1000, *cert. den.*, 377 U.S. 978 (1964)." *Wisconsin* v. *Yoder*, 406 U.S. 205, at 239, n. 1 (1972) (concurring opinion of Mr. Justice White). The relief which plaintiffs seek here obviously poses no such danger. For over a century after its founding, the nation survived with no national income tax whatever; even after the enactment of such a tax, the withholding method was not used for decades, until 1943 (Act of June 9, 1943, c. 120, §2(a), 57 Stat. 126). Indeed, the legislative history cited by the government itself in the Jurisdictional Statement (p. 11), H. Rep. No. 268, 78th Cong., First Sess., pp. 1-2; S. Rep. No. 221, 78th Cong., First Sess., p. 1, makes plain that the primary purpose in the enactment of the withholding system was the protection of taxpayers, and not of the government. As taxes rose in World War II, it became more difficult to make payment in a single lump sum at the end of the tax year, and the withholding system was therefore instituted. Insofar as the challenged procedure exists for the benefit of the taxpayers, rather than that of the government, of course, the government can assert no interest whatsoever in opposition to the First Amendment claims of the respondents.

A correct application of the tests which this Court has applied in the past in free exercise cases, it is respectfully submitted, can reach only one result. The government has sought to abridge the most deeply held religious beliefs of certain of its citizens, but has been unable to show any substantial interest whatever in continuing to do so. Therefore, it must be seen that the decision of the court below was correct on the merits, and should be affirmed.

B. *The District Court Had Jurisdiction to Grant the Injunction.*

The government contends that the court below was barred from issuing the injunction in this case by the Anti-Injunction Act, 26 U.S.C. §7421(a), which provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . ."[12] It is abundantly clear, however, both from the language of the statute, and its purpose, that it does not bar the relief which was granted by the court below.

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[12] The government also seeks to interpose its purported immunity to suit as a sovereign (p. 14, fn. 7), but that doctrine plainly has no application to this case. The cases offered by the government are of little relevance to the constitutional issues here presented; those cases by contrast involve water rights, *Dugan* v. *Rank*, 372 U.S. 609 (1963), or contract rights, *Larson* v. *Domestic & Foreign Service Corp.*, 337 U.S. 683 (1949); *United States* v. *Sherwood*, 312 U.S. 584 (1941), or ordinary tax questions, *Matya* v. *United States*, 478 F.2d 330 (8th Cir. 1973); *Buck* v. *United States*, 466 F.2d 481 (10th Cir. 1972). But as this Court noted in *Larson* itself, "There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the government, it is proper that the courts have the power to grant relief against those actions." 337 U.S. at 705. To assert, on this basis, that plaintiffs might have had relief against an officer of the government, but not against the government itself, is absurd on its face; the government would hardly have reacted to this suit in any different way had one of its officers been named a defendant, or named the sole defendant. Similarly, if the plaintiffs are properly entitled to the relief granted by the court below, the result is identical whether the United States or its District Director of Internal Revenue is ordered to cease using the challenged method of collection. Indeed, the government itself has asserted this very position, when its purposes are thereby served. *Jules Hairstylists of Maryland, Inc.* v. *United States*, 268 F. Supp. 511, 514 (D. Md. 1967), *aff'd* 389 F.2d 389 (4th Cir. 1968), *cert. den.*, 391 U.S. 934 (1968). As Mr. Justice Cardozo observed, in *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 382-383 (1933), "A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought . . . . There may have been utility in such procedural

First, the injunction which has been issued in no way restrains the assessment or collection of the taxes involved; it only forbids the government to make use of one method of collection, while leaving it free to use all of the other means at its disposal. Indeed, as the court below found, the government has regularly and successfully resorted to its power to levy on the assets of the employees here involved, to collect all of the money due it; that power is unaffected by the injunction which has been issued.

There is, thus, little relevance to such cases as *Bob Jones University* v. *Simon*, —— U.S. ——, 42 U.S.L.W. 4721, No. 72-1940 (May 15, 1974), or *Enochs* v. *Williams Packing & Nav. Co.*, 370 U.S. 1 (1962). Those cases, and the statute itself, plainly concern themselves with suits seeking injunctions against collection of the taxes by any means whatever, while the taxpayer litigates the question of whether they are due at all. The Congressional policy is that the taxes be collected, and the government have the revenue, while the propriety of the taxes is litigated in a suit for refund or otherwise.

As the court below noted, however, the employee plaintiffs here, Cleveland and Cadwallader, unlike the taxpayers in *Enochs* or in *Bob Jones*, cannot be remitted to the remedy of a refund suit, for they have no such remedy.

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devices in days when the Government was not suable as freely as now. [Citations omitted.] They have little utility today . . . . In such circumstances [the Collector's] presence as a defendant is merely a remedial expedient for bringing the Government into court." To allow this "anomalous rule" to defeat the assertion of the free exercise of the plaintiffs' religion, is to permit a government of supposedly limited, constitutionally defined powers, to arrogate to itself any power it chooses, within the Constitution or without, by the simple expedient of refusing to allow its citizens the right to sue.

They do not contend that the government owes them any money, or that the taxes which have been collected from them by levy were not legally due. If the individual plaintiffs are denied the right to an action for an injunction, they are left entirely without a remedy to vindicate their right to the free exercise of their religion under the First Amendment. Compare *Commissioner* v. *"Americans United,"* —— U.S. ——, ——, 42 U.S.L.W. 4711, 4714, No. 72-1371 (May 15, 1974), finding §7421 applicable because "respondent will have a full opportunity to litigate the legality" of the taxes there in question, by means of a suit for refund.

Finally, this action involved not merely the injunction sought by the individual plaintiffs, but also the valid claim for a refund on behalf of AFSC.[13]

As this Court observed in *Bob Jones*, —— U.S. at ——, 42 U.S.L.W. at 4728, fn. 22, very different considerations apply in an action which seeks not an injunction alone, but a refund as well; such an action is not solely "for the purpose of restraining the assessment or collection of any tax," and thus "neither the literal terms nor the principal purpose of §7421(a) are applicable. Moreover, such a suit obviously does not clash with what the Court referred to in *Williams Packing, supra*, as a 'collateral objective of the Act—protection of the collector from litigation pending a

[13] The government appears to concede the validity of the refund claim, by its failure to appeal from this portion of the decision below (Jurisdictional Statement at p. 7, fn. 3). This failure to appeal, however, would appear also to be a concession that the court below was correct in holding that the AFSC had a right not to withhold the disputed portion of its employees' salaries, for if the position otherwise asserted by the government is correct, the sums remitted by the AFSC were properly due to the government, and any refund due is a refund to the employees of the tax monies collected by levy.

suit for a refund.' 370 U.S. at 7-8 . . . . [O]ur decision today . . . should not be interpreted as deciding whether injunctive relief is possible in a refund suit in a district court."

There was, thus, no bar to the jurisdiction of the court below to issue the injunction, and its decision should be affirmed.

CONCLUSION

For all of the reasons set forth above, the appeal should be dismissed or the decision below summarily affirmed.

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Respectfully submitted,

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